Supreme Court of the United States

October term, 1952

No. 439

LOUIS LEVINSON and MITCHELL A. HALL,
Petitioners and Appellants below,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, Deceased,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHARLES E. LESTER, JR.,
STEPHENS L. BLAKELY,
Proctors for Petitioners.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

Subject Index

Table of Cases Cited

Table of Statutes Cited

Table of Court Rules Cited

Supreme Court of the United States

October term, 1952

No. ____

LOUIS LEVINSON and MITCHELL A. HALL,
Petitioners and Appellants below,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, Deceased,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of Louis Levinson and Mitchell A. Hall respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in admiralty filed by William Deupree, Jr., as ancillary administrator of the estate of Katherine Wing, deceased, in the United States District Court for the Eastern District of Kentucky to recover damages for the wrongful death of Katherine Wing, a resident of New York State, who died on June 19, 1948, as a result of injuries received in a boat collision on the Ohio River in Campbell County, Kentucky. Katherine Wing was a passenger in a

motor boat owned and operated by the petitioner, Louis Levinson, which collided with a motor boat owned and operated by the petitioner, Mitchell A. Hall, it being alleged in the libel that the collision was a result of the negligence of both petitioners.

The libel filed in the District Court on December 7, 1948, in addition to alleging the facts of the incident, sets forth the appointment of a domiciliary administratrix in New York on October 22, 1948, and the appointment of William Deupree, Jr., as ancillary administrator of decedent's estate by the County Court of Kenton County, Kentucky, on December 7, 1948 (R. p. 1). To the libel both petitioners on March 23, 1949, filed answers in the nature of general denials (R. pp. 4, 5, 6, 7, 8). On July 7, 1949, the ancillary administrator filed an affidavit for leave to sue in forma pauperis wherein he stated that "libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given" (R. pp. 8, 9). Petitioners immediately filed special demurrers to the libel, asserting that upon the face of the record the court was without jurisdiction to try the case, that it had no jurisdiction of the subject matter, and that the ancillary administrator did not have legal capacity to sue (R. pp. 9, 10, 11, 12). The District Court read into the libel the affidavit of the ancillary administrator for leave to proceed in forma pauperis and considered both the libel and the affidavit on the special demurrer and held that these two documents showed that the injury to decedent from which death resulted occurred in Campbell County, Kentucky, and that the decedent possessed no estate in Kenton County, Kentucky, and that therefore the appointment of the ancillary administrator in Kenton County was void and sustained the special demurrer, granting leave to the ancillary administrator to file an amended libel (R. pp. 15, 16). The amended libel tendered on July 29, 1949,

and ordered filed on September 9, 1949 (R. pp. 15, 16) alleged that on July 28, 1949, William Deupree, Jr., had been appointed ancillary administrator in Campbell County, Kentucky, and that the libel was brought by him in his capacity as ancillary administrator appointed in both Kenton and Campbell Counties, Kentucky (R. pp. 12, 13, 14, 15). In all other respects the amended libel was identical with the original one. To the libel as amended petitioners thereupon demurred generally on the ground that no cause of action was stated, again asserting as on the special demurrer that the order of the Kenton County Court appointing the administrator was void and contending further that the Campbell County appointment could not sustain the suit because made more than one year after the infliction of the fatal injury, the period of limitation on death actions in Kentucky being one year from the date of death (R. pp. 16, 17, 18). The District Court sustained the general demurrers (R. p. 19) and, upon the ancillary administrator's declining to plead further, entered judgment dismissing the libel as amended (R. p. 21).

The ancillary administrator appealed from the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit and it in an opinion dated December 22, 1950, reversed the judgment of the District Court and remanded the cause for further proceedings in accordance with its opinion (R. pp. 24 to and incl. 34).

Petition for a writ of certiorari was denied April 23, 1951, **Levinson, et al. v. Deupree, etc.**, 341 U. S. 915, 71 S. Ct. 736, 95 L. Ed. 1351.

Upon return of the case to the District Court issue was joined by the answers of respondents to the libel as amended (R. pp. 36 to and incl. 43) and respondent's reply to such answers (R. pp. 49-50), and upon the issue thus joined a trial resulted in a joint and several decree in favor of respondent and against petitioners in the sum of $30,000.00 and costs (R. p. 63).

Upon appeal by petitioners to the United States Court of Appeals for the Sixth Circuit, the decree of the District Court was on October 20, 1952, affirmed (R. p. 71).

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1254, U. S. C., Supreme Court Rule 38. The date of the judgment to be reviewed is October 20, 1952 (R. p. 71, Opinion below, pp. 24 to and incl. 34).

QUESTION PRESENTED

The question herein presented is whether admiralty courts, when invoked to enforce rights created by state law and unkown to admiralty, are bound by the law of such state, or the general maritime law.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. In the opinion below (R. p. 28) the court said: "Viewing the question as an open one, therefore, not ruled upon by the Supreme Court" and held the general maritime law controlling as opposed to the law of Kentucky which created the right sued upon, thereby presenting the spectacle of a double system of conflicting laws in the same state in actions founded on the same state statute. The cause of action is grounded upon Kentucky Revised Statutes Sec. 411.130 (wrongful death) and if same had been litigated in a Kentucky court would have suffered death under sentence of the statute of limitations, Kentucky Revised Statutes Sec. 413.140, as held by the Court of Appeals of Kentucky in

the case of **Vassill's Adm'r v. Scarsella**, 1942, 292 Ky. 153, 166 S. W. (2d) 64, and **Jewel Tea Co. v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66. The opinion of the United States Court of Appeals gives one asserting a right (action for wrongful death) created by Kentucky law preferential treatment if an admiralty court be selected as the forum as compared to a litigant asserting his right under the same statute because of a terrene tort either in a court of Kentucky or a federal common law court.

(b) The United States Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. The libel in the case at bar asks enforcement of a state-created right borrowed by the admiralty. A remedy for wrongful death was unknown to the maritime law. **Lindgren v. U. S.**, 1930, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686. It was, however, adopted by the admiralty and enforced long ago. **The Harrisburg**, 1886, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358. And, since **The Harrisburg** decision enforcement of state wrongful death statutes in the admiralty has been expressly justified (**Western Fuel Co. v. Garcia**, 1921, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210) under the "maritime but local" doctrine, i.e., the nature of the remedy is such that it does not affect the uniformity requirement in admiralty.

The opinion of the United States Court of Appeals in the instant case seems to indicate that for the sake of uniformity in the admiralty practice, the general maritime law and not the local law must be followed. The opinion ignores the "maritime but local" doctrine that uniformity in the admiralty practice is not required when the admiralty court is the forum selected to enforce a state-created right unknown to the admiralty. In **Western Fuel Co. v. Garcia**, **supra**, the court hinted that if a state creates a right, and the admiralty borrows it, then logic suggests such right ought to be taken with all its imperfections and limitations

and that the requirement of uniformity in admiralty furnishes no basis for argument to the contrary. The enforcement of such a state-created right in an admiralty court is permissible only under the "maritime but local" doctrine and is an exception to the requirement of uniformity in maritime law. (**Just v. Chambers**, 1941, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903).

This litigation is an attempt to enforce in admiralty a right created by local (Kentucky) law and the decision of the Court of Appeals is in direct conflict with the Kentucky decisions cited in (a) hereof, **Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r.** This conflict ought to be resolved by the Supreme Court.

WHEREFORE your Petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, Louis Levinson and Mitchell A. Hall, Appellants v. William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, Deceased, Appellee, and numbered in said court 11,600, and that said judgment of the United States Court of Appeals for the Sixth Circuit be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

LOUIS LEVINSON,
By CHARLES E. LESTER, JR.,
Proctor for Petitioner.

MITCHELL A. HALL,
By STEPHENS L. BLAKELY,
Proctor for Petitioner.

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. ....

LOUIS LEVINSON and MITCHELL A. HALL,

Petitioners and Appellants below,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, Deceased,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 186 F. (2d) 297, and is printed in full in the record (R. pp. 24 to and incl. 34).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1254, U. S. C. The United States Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court." [Supreme Court Rule 38 (5) (b)]. The United States Court of Appeals "has decided an important question of local law in a way probably in conflict with

applicable local decisions." [Supreme Court Rule 38 (5) (b)].

Judgment was entered in this case by the United States Court of Appeals on October 20, 1952 (R. p. 71).

STATEMENT OF THE CASE

A full statement of the case has been given in the Petition, and in the interest of brevity the statement is not repeated at this point.

In sustaining the special demurrer to the original libel the District Court took the view that the order of the County Court of Kenton County, Kentucky, appointing respondent ancillary administrator was void under Kentucky law under the decisions of the Kentucky Court of Appeals in **Vassill's Adm'r v. Scarsella**, 1942, 292 Ky. 153, 166 S. W. (2d) 64, and **Jewel Tea Co. v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66, and that such void appointment did not sustain the libel.

In sustaining the general demurrer to the libel as amended the District Court did so upon the ground that under Kentucky law respondent did not obtain a valid order of the County Court of Campbell County, Kentucky, appointing him such administrator until July 28, 1949, and that therefore his amended libel which he was given leave to file on September 9, 1949, came too late in that more than a year had elapsed between the date of decedent's death on June 19, 1948, and the commencement of the action, and the cause was barred by the statute of limitations, Kentucky Revised Statutes, Section 413.140.

In its opinion the United States Court of Appeals (R. p. 28) said that if the decisions of the Kentucky courts are to be applied in this admiralty case, the judgment of the District Court must be affirmed and the critical question, therefore, is whether the decisions of the state court

are controlling, or whether what the United States Court of Appeals conceived to be the federal and admiralty law should be applied.

ERRORS RELIED UPON

The United States Court of Appeals for the Sixth Circuit erred in holding that the state (Kentucky) law is not controlling. The Court further erred in basing this view upon the ground that uniformity is in all cases required in the admiralty law, ignoring the "maritime but local" doctrine.

ARGUMENT

I

Actions for wrongful death are unknown to admiralty law. **Lindgren v. United States**, 1930, 281 U. S. 38, 50 S. Ct., 207, 74 L. Ed. 686. The cause of action for which enforcement is asked in admiralty is a right created by Kentucky law under its modern counterpart of Lord Campbell's Act, Kentucky Revised Statutes, Section 411.130, the wrongful death statute. Admiralty jurisdiction is invoked solely by reason of the alleged tort being maritime rather than terrene in character. Only the geographical fact of the incident resulting in death occurring upon a water highway of Kentucky rather than upon a turnpike or city street, enabled respondent to seek enforcement of his right in an admiralty court. **The Harrisburg**, 1886, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358.

II

The death for which recovery is sought occurred in Kentucky in Campbell County on June 19, 1948, as a consequence of injuries received by decedent in that state and county upon that date. Action for her death was barred in one year therefrom under Kentucky Revised Statutes, Sec-

tion 413.140. To toll the statute required the filing of suit within that time by a Kentucky (ancillary) administrator appointed to such office by a Kentucky county court (court of probate) having jurisdiction to make such appointment. **Kentucky Constitution,** Sections 140 and 141; **Kentucky Revised Statutes,** Section 25.110, 395.030, 394.140; **Gilbert v. Bartlett,** 1872, 72 Ky. 49, 9 Bush 49; **Commonwealth v. Central Consumer's,** 1906, 122 Ky. 418, 28 Ky. L. Rep. 1363, 91 S. W. 711; **Silbersack v. Kraft,** 1922, 194 Ky. 587, 240 S. W. 392; **Brown's Adm'r v. Louisville & Nashville Railroad Co.,** 1895, 97 Ky. 228, 17 Ky. L. Rep. 145, 30 S. W. 639; **Hall's Adm'r v. Louisville & Nashville R. R. Co.,** 1897, 102 Ky. 480, 19 Ky. L. Rep. 1529, 43 S. W. 698; **Walter's Adm'r v. Kentucky Traction & Terminal Company,** 1924, 206 Ky. 100, 266 S. W. 887; **Vassill's Adm'r v. Scarsella,** 1942, 292 Ky. 153, 166 S. W. (2d) 64; **Jewel Tea Company v. Walker's Adm'r,** 1942, 290 Ky. 328, 161 S. W. (2d) 66. Decedent was a New York resident possessed of no estate in Kentucky and under Kentucky law no county court except that of Campbell County where she was killed had jurisdiction to appoint respondent to the office of administrator. (Cases last cited.)

Under Kentucky law the attempt to commence suit based upon the order appointing respondent administrator was a nullity and did not toll the limitations statute. It was the same as if no suit at all had been filed. **Vassill's Adm'r v. Scarsella,** 1942, 292 Ky. 153, 166 S. W. (2d) 64; **Jewel Tea Company v. Walker's Adm'r,** 1942, 290 Ky. 328, 161 S. W. (2d) 66.

III

In an attempt to avoid the bar of the Kentucky limitations statute respondent obtained his appointment to the office of administrator by order of the County Court of Campbell County, Kentucky, on July 28, 1949, more than a year after the death of his decedent, and offered his

amended libel alleging his appointment by both Kenton and Campbell County courts to cure his error in filing suit based upon the void order of Kenton County Court. But under Kentucky law this availed him nothing. The holding in **Vassill's Adm'r v. Scarsella, supra**, is that such amendment does not relate back to the original pleading and does not toll the limitations statute. Under the law of Kentucky which created respondent's cause of action, his cause was dead.

IV

Respondent argued in the District Court and in the Court of Appeals that to grant or deny leave to amend is a matter of procedural and not substantive law, is controlled by the law of the forum and that under the holding of this Court in **Missouri, Kansas and Texas Ry. Co. v. Wulf**, 1913, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, the amendment is proper and relates back to the date of the filing of the original pleading so as to save the cause from the bar of limitations. With this contention the Court of Appeals agreed and if its decision is not reversed it will establish not only a double system of conflicting laws in the same state but a double system in the same court in actions founded on the same state statute. If in the case at bar the jurisdiction of the federal court had been invoked because of diversity of citizenship, the original judgment of the District Court would of necessity be affirmed under **Guaranty Trust Co. v. York**, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231. Should the mere circumstance of the fatal accident to decedent having occurred upon a water highway of Kentucky instead of a turnpike, road or street, vest respondent in a federal admiralty court with a right denied him in a federal court of common law? To answer affirmatively would do violence to **Guaranty Trust Co. v. York, supra**, which has been thought to express a federal policy (**Rose v. U. S.**, 1947, 73 F. Sup. 759, at

Page 763). The result of this litigation, founded as it is upon a state-created right, should be the same as if tried in a Kentucky court.

It is of no consequence that the rule in **Guaranty Trust Co. v. York, supra,** has as yet not been applied to a case in admiralty for wrongful death founded upon a state statute. The reason for the application of the rule exists and it ought now to be applied to the case at bar. The mere choice by respondent of a federal court forum ought not to give him any rights which are denied him in a Kentucky court. Kentucky denies the right to amend after the running of the statute of limitations. The federal courts should do likewise.

Why should not the reasoning in **Guaranty Trust Co. v. York** control here? It would be difficult to distinguish between the rule to be applied in a diversity case founded upon a state-created right and this cause of action asserted in admiralty and likewise founded upon a state-created right. It would seem incongruous to accord respondent an advantage by reason of his having chosen the United States District Court as a forum which would be denied him had he sought relief in a court of Kentucky from which Commonwealth he derives his very right to sue at all.

And there is no basis in reason to argue that uniformity in the admiralty practice requires affirmance. Uniformity is not required under the "maritime but local" doctrine. See **Just v. Chambers, supra,** where it was said:

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. 'Uniformity is required only when the essential features of

an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers. The judgment or decision of the United States Court of Appeals is erroneous and should be reversed with instructions to enter a judgment affirming the original judgment of the District Court entered on October 5, 1949, as same appears at R. p. 21. In the language of Mr. Justice Frankfurter in **Guaranty Trust Co. v. York**, "The outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

CHAS. E. LESTER, JR.,
Proctor for Petitioner,
LOUIS LEVINSON.

STEPHENS L. BLAKELY,
Proctor for Petitioner,
MITCHELL A. HALL.